

ALLERGAN, INC., ET AL. -vs- APOTEX, INC., ET AL.  
Final PreTrial Conference on 10/11/2012

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1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

3 CASE NO. 1:10-CV-681

4 ALLERGAN, INC. AND DUKE )  
5 UNIVERSITY, )  
6 Plaintiffs, )

7 -vs- )

8 APOTEX, INC. AND APOTEX )  
9 CORP., )  
10 Defendants. )

11 CASE NO. 1:11-CV-298

12 ALLERGAN, INC. and DUKE )  
13 UNIVERSITY, )  
14 Plaintiffs, )

15 -vs- )

16 SANDOZ, INC., )  
17 Defendant. )

18 CASE NO. 1:11-CV-650

19 ALLERGAN, INC. and DUKE )  
20 UNIVERSITY, )  
21 Plaintiffs, )

22 -vs- )

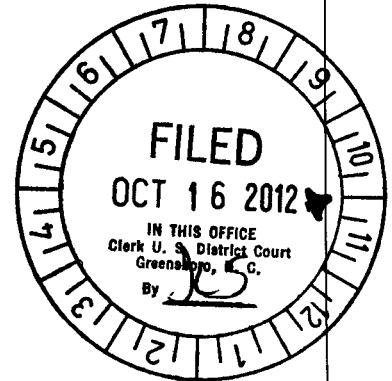
23 HI-TECH PHARMACAL CO., INC., )  
24 Defendant. )

25 -----

26 FINAL PRETRIAL CONFERENCE

27 BEFORE THE HONORABLE CATHERINE C. EAGLES

ORIGINAL



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<p style="text-align: right;"><b>Page 2</b></p> <p>1 United States District Court 2 324 West Market Street 3 Courtroom 3 4 Greensboro, North Carolina</p> <p>5 6 Thursday, October 11th, 2012</p> <p>7 8 9:00 a.m. to 11:05 a.m.</p> <p>9</p> <p>10 REPORTED BY: Beverly J. Gramm, RPR 11 Notary Public</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;"><b>Page 4</b></p> <p>1 APPEARANCE OF COUNSEL: (cont'd)</p> <p>2 On Behalf of Defendant Apotex, Inc. 3 and Apotex, Corp.:</p> <p>4 ANDREW M. ALUL, ESQ. 5 - and - 6 PAUL J. MOLINO, ESQ. 7 Rakoczy, Molino, Mazzocchi, Siwik, LLP 8 6 West Hubbard Street - Suite 500 9 Chicago, IL 60654 10 (312) 527-2157 11 aalul@rmmslegal.com 12 paul@rmmslegal.com</p> <p>13</p> <p>14 DARRELL A. FRUTH, ESQ. 15 Brooks, Pierce, McLendon, 16 Humphrey &amp; Leonard, LLP 17 2000 Renaissance Plaza 18 230 North Elm Street 19 Greensboro, NC 27401 20 (336) 373-8850 21 dfruth@brooksperce.com</p> <p>22</p> <p>23 On Behalf of Defendant Sandoz, Inc.:</p> <p>24 TOM FILARSKI, ESQ. 25 - and - 26 BRANDON C. HELMS, ESQ. 27 Steptoe &amp; Johnson, LLP 28 115 South LaSalle Street - Suite 3100 29 Chicago, IL 60603 30 (312) 577-1251 31 tfilarski@steptoe.com 32 bhelms@steptoe.com</p> <p>33</p> <p>34 F. HILL ALLEN, ESQ. 35 Tharrington Smith, LLP 36 209 Fayetteville Street Mall 37 P.O. Box 1151 38 Raleigh, NC 27602 39 (919) 821-4711 40 hallen@tsmithlaw.com</p>
<p style="text-align: right;"><b>Page 3</b></p> <p>1 APPEARANCES OF COUNSEL:</p> <p>2 On Behalf of the Plaintiffs:</p> <p>3 LARRY McDEVITT, ESQ. 4 - and - 5 HEATHER WHITAKER GOLDSTEIN, ESQ. 6 The Van Winkle Law Firm 7 11 North Market Street - Suite 300 8 Asheville, NC 28801 9 (828) 258-2991 10 lmcdevitt@vwlawfirm.com 11 hgoldstein@vwlawfirm.com</p> <p>12</p> <p>13 JONATHAN E. SINGER, ESQ. 14 Fish &amp; Richardson, P.C. 15 60 South Sixth Street - Suite 3200 16 Minneapolis, MN 55402 17 (612) 335-5070 18 singer@fr.com</p> <p>19</p> <p>20 ELIZABETH M. FLANAGAN, ESQ. 21 - and - 22 DOUGLAS E. McCANN, ESQ. 23 Fish &amp; Richardson, P.C. 24 222 Delaware Avenue - 17th Floor 25 P.O. Box 1114 26 Wilmington, DE 19899 27 (302) 652-5070 28 eflanagan@fr.com 29 dmccann@fr.com</p> <p>30</p> <p>31 JEFFREY T. THOMAS, ESQ. 32 Gibson, Dunn &amp; Crutcher, LLP 33 3161 Michelson Drive 34 Irvine, CA 92612 35 (949) 451-3800 36 jthomas@gibsondunn.com</p>	<p style="text-align: right;"><b>Page 5</b></p> <p>1 APPEARANCES OF COUNSEL: (cont'd)</p> <p>2 On Behalf of Defendant Hi-Tech 3 Pharmacal Co., Inc.:</p> <p>4 STEVEN B. FOX, ESQ. 5 - and - 6 LYN K. BROOM, ESQ. 7 Teague, Rotenstreich, Stanaland, 8 Fox &amp; Holt, PLLC 9 101 South Elm Street - Suite 350 10 Greensboro, NC 27401 11 (336) 272-4810 12 sbf@trslaw.com 13 lkb@trslaw.com</p> <p>14</p> <p>15 ALSO PRESENT:</p> <p>16 Marlene Sanders 17 In-Court Clerk</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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<p style="text-align: right;"><b>Page 6</b></p> <p>1 THE COURT: Good morning.</p> <p>2 THE AUDIENCE: Good morning, Your Honor.</p> <p>3 THE COURT: I asked the clerk if it was</p> <p>4 cold in here and she said no, but I think she</p> <p>5 and I have different thermostats. I don't know</p> <p>6 if you all are cold. I'm sorry, it's been cold</p> <p>7 up here all week because of when they turn the</p> <p>8 heat on. We don't need to create our own. I</p> <p>9 hope you all will be getting along better than</p> <p>10 that.</p> <p>11 All right. So I've got -- let me get</p> <p>12 organized here. All right. So I saw somebody</p> <p>13 sent me a list of things suggested for</p> <p>14 plaintiffs. I again recall the plaintiffs, I</p> <p>15 guess, were suggesting that we talk about</p> <p>16 today, and I have my own list as well.</p> <p>17 So why doesn't everybody first just remind</p> <p>18 me of their names.</p> <p>19 MR. McDEVITT: May it please the Court, my</p> <p>20 name is Larry McDevitt, I'm with the Van Winkle</p> <p>21 Law Firm in Asheville, and I represent the</p> <p>22 plaintiffs.</p> <p>23 MR. SINGER: Jonathan Singer with Fish &amp;</p> <p>24 Richardson Law Firm, I represent the plaintiffs</p> <p>25 as well.</p>	<p style="text-align: right;"><b>Page 7</b></p> <p>1 MR. McDEVITT: Your Honor, we will be the</p> <p>2 only two speaking today. If I may, we have</p> <p>3 some folks here that -- Jeff Thomas with the</p> <p>4 firm of Gibson Dunn.</p> <p>5 MR. THOMAS: Good morning, Your Honor.</p> <p>6 MR. McDEVITT: He practices in California.</p> <p>7 Doug McCann, who is counsel for Duke</p> <p>8 University.</p> <p>9 THE COURT: He's been here before.</p> <p>10 MR. McCANN: Yes.</p> <p>11 MR. McDEVITT: My partner, Heather</p> <p>12 Goldstein, who's here trying to watch me make a</p> <p>13 fool of myself. And we have Betsy Flanagan</p> <p>14 here and Doug McCann, who are partners of</p> <p>15 Mr. Singer here with Fish &amp; Richardson.</p> <p>16 THE COURT: All right. Great. Thank you.</p> <p>17 MR. FRUTH: Good morning, Your Honor.</p> <p>18 Darrell Fruth on behalf of Apotex and -- with</p> <p>19 Brooks Pierce. And with me are Andy Alul and</p> <p>20 Paul Molino from the Rakoczy, Molino -- a lot</p> <p>21 of consonants.</p> <p>22 THE COURT: All right.</p> <p>23 MR. ALUL: Good morning, Your Honor.</p> <p>24 THE COURT: Let me just one second.</p> <p>25 Mr. -- I'll try to say your name.</p>	<p style="text-align: right;"><b>Page 8</b></p> <p>1 MR. ALUL: Alul.</p> <p>2 THE COURT: Okay. All right. Thank you.</p> <p>3 MR. ALLEN: Good morning, Your Honor.</p> <p>4 Hill Allen with Tharrington Smith from Raleigh.</p> <p>5 And I'll let lead counsel introduce themselves.</p> <p>6 MR. FILARSKI: Thank you, Hill. Good</p> <p>7 morning, Your Honor. Tom Filarski on behalf of</p> <p>8 Sandoz. And with me is Brandon Helms.</p> <p>9 MR. HELMS: Good morning, Your Honor.</p> <p>10 MS. BROOM: Good morning, Your Honor. Lyn</p> <p>11 Broom here on behalf of Hi-Tech. And we have</p> <p>12 advised the Court I'm in trial with Judge</p> <p>13 Osteen downstairs right now. And Steve Fox</p> <p>14 from our office.</p> <p>15 MR. FOX: Good to see you, Your Honor.</p> <p>16 THE COURT: Good morning.</p> <p>17 MS. BROOM: He's going to be here today</p> <p>18 for Hi-Tech.</p> <p>19 THE COURT: All right. Fine. Well, you</p> <p>20 get on back to Judge Osteen, since I know you</p> <p>21 all are in the second week of your trial.</p> <p>22 MS. BROOM: Yes, ma'am. Thank you.</p> <p>23 THE COURT: Thank you. And I apologize</p> <p>24 that I need people to tell me their names</p> <p>25 again. I'm sure I will know you all by the</p>	<p style="text-align: right;"><b>Page 9</b></p> <p>1 middle of November and have you all straight,</p> <p>2 but I don't see you often enough. So thank you</p> <p>3 for your patience on that.</p> <p>4 So, first of all, if anything is said</p> <p>5 today that is confidential and needs to be</p> <p>6 sealed you all need to say that. I believe</p> <p>7 your protective order in place for this case</p> <p>8 calls for you to say that before, since we're</p> <p>9 in open court, before you say the confidential</p> <p>10 thing, so the court reporter knows.</p> <p>11 I doubt we'll be talking about anything</p> <p>12 confidential today but just a reminder. And</p> <p>13 I'm assuming once we get going with the trial</p> <p>14 everything is public, in public.</p> <p>15 If that is not so, somebody needs to</p> <p>16 advise me of how we're going to deal with that.</p> <p>17 Because that -- generally speaking, courts are</p> <p>18 open. I have not looked into this in patent</p> <p>19 cases but, you know, if anybody is going to</p> <p>20 want to close the courtroom you're going to</p> <p>21 need to give me some advance notice because</p> <p>22 that's pretty serious.</p> <p>23 All right. Okay. So in terms of getting</p> <p>24 started with the trial, I'll just tell you what</p> <p>25 I was thinking and then unless you all have</p>
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<p style="text-align: right;">Page 10</p> <p>1 reached some agreement about time and -- no, 2 okay. First, I was going to ask you all to 3 confer about stipulations and to encourage you 4 to stipulate to undisputed facts and to get 5 those files, say, by -- is there a deadline in 6 any of these rules?</p> <p>7 But if you've -- if you get them done by 8 what, October 26th, that's a week before the 9 trial starts. But I would just encourage you 10 to do that. It can save us some time and be 11 helpful.</p> <p>12 And then I know I've already entered an 13 order requiring you to exchange witness lists 14 and exhibit lists and such, and I entered an 15 order telling you when you had to give the 16 clerk copies of the exhibits, but I did not say 17 when I wanted your witness list and exhibit 18 list.</p> <p>19 So if you all will get those filed on 20 October 26th, your final witness lists, and 21 just a list of your exhibits, as well as 22 providing the clerk with the copies, that would 23 be helpful.</p> <p>24 So I don't know that we need to have any 25 discussion about those things unless somebody</p>	<p style="text-align: right;">Page 12</p> <p>1 they'll do this, we will too. But the time -- 2 by the time we get to trial, while we've listed 3 700, that's going to be pared down 4 significantly.</p> <p>5 And our thought was, if you were willing, 6 to have us hand up to you the exhibits. We 7 certainly can send you everything on a CD. But 8 to hand up the exhibits to you as we -- when we 9 start to examine the witness, you know, we'll 10 have them in the book, or in some way that you 11 can have them at the ready.</p> <p>12 But we were just concerned about the 13 volume of providing three copies and wondering 14 if you would be open to reconsidering that.</p> <p>15 THE COURT: Well, that's legitimate. I 16 don't think I realized we were going to be 17 looking at that many pages. But I will -- 18 having had an experience earlier this year with 19 a lot of exhibits, and I let the parties do it 20 the way you're proposing, and it really caused 21 some logistical problems in keeping up with the 22 exhibits.</p> <p>23 So, really, it caused the clerk a lot of 24 problems in keeping up with the exhibits. So 25 I'm certainly -- would be happy to have some</p>
<p style="text-align: right;">Page 11</p> <p>1 has a problem with any of that.</p> <p>2 MR. McDEVITT: I don't know that I have a 3 problem, Your Honor, about the exhibits. We've 4 got the list. I believe you asked us to 5 provide three sets of exhibits.</p> <p>6 THE COURT: Yes.</p> <p>7 MR. McDEVITT: Would this be an 8 appropriate time to address that, just for a 9 minute?</p> <p>10 THE COURT: We can.</p> <p>11 MR. McDEVITT: I think the plaintiff has 12 over 700 exhibits, the defendant over a 13 thousand. The last time we checked. I think 14 the total pages of those exhibits come to over 15 around 120,000 pages. I'm --</p> <p>16 THE COURT: I don't think we need to kill 17 that many trees.</p> <p>18 MR. McDEVITT: Well, I was wondering, I 19 knew you didn't have that information when you 20 entered the order. And a lot of it, for 21 instance, on ours, a good chunk of it are -- 22 consists of copies of our filing with the FDA 23 and copies of their filings that just take up a 24 big chunk of paper.</p> <p>25 We were really wondering -- and I know</p>	<p style="text-align: right;">Page 13</p> <p>1 more limited extra copies, if you -- but maybe 2 you could give the clerk the electronic copy in 3 one and just the original, the actual exhibit 4 before the trial starts.</p> <p>5 I mean, if you're going to offer it into 6 evidence, you've got to have a physical hard 7 copy of it. I think we still do it that way. 8 Right?</p> <p>9 MR. McDEVITT: Yes, Your Honor, we do. 10 And the only part of the rationale as the case 11 progresses, it naturally may affect the 12 exhibits that we offer.</p> <p>13 Perhaps, I wonder if this would work, if 14 we had them identified as best we can, say two 15 days before we're going to put on the witness, 16 with the understanding that if things develop 17 where we have to use another exhibit or take 18 one off, that we could do that.</p> <p>19 It -- we certainly want to make it work 20 for you, for the court clerk, the defendants, 21 as well as ourselves.</p> <p>22 All right. What's the defendants' 23 suggestion?</p> <p>24 MR. ALUL: Your Honor, Andy Alul on behalf 25 of Apotex, defendants. We actually share</p>

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<p style="text-align: right;">Page 14</p> <p>1 plaintiffs' concern on this. We do have 2 tentatively listed in our Rule 26(A) (3) 3 disclosures I believe over a thousand exhibits. 4 We're still developing our trial strategy. 5 We're trying to figure out exactly which 6 ones we're going to use, but we think that 7 plaintiffs' suggestion is prudent, providing 8 that -- the clerk with electronic copies of all 9 the exhibits, which would save a lot of trees. 10 THE COURT: Yeah. 11 MR. ALUL: And then maybe only providing 12 hard copies of exhibits that we're actually 13 going to be using in direct examinations. 14 THE COURT: Okay. It's just, you know, we 15 keep up with them by exhibit number, 1, 2, 3. 16 So what the problem will arise, it -- well, 17 it's -- if you're actually going to introduce 18 700 exhibits then, you know, I need them in 19 advance. 20 If you're going to introduce 40 or 50 21 exhibits, we can deal with it the way you all 22 are talking about. But -- 23 MR. McDEVITT: We are not going to 24 introduce 700 exhibits, or anything close to 25 it. I hate to represent that we're going to</p>	<p style="text-align: right;">Page 16</p> <p>1 MR. ALUL: That's correct, Your Honor. 2 MR. McDEVITT: We have an idea. We just 3 discussed that we both agree, if this helps, we 4 would be willing to have someone from our side 5 and one from theirs get together for just a few 6 minutes with the clerk at the close of each 7 day's trial to make sure that the exhibits that 8 we've identified and marked and offered, that 9 our records fit with hers, that the numbering 10 is correct, that the order is correct. Just to 11 make sure that the records are accurate. 12 THE COURT: Well, that would be necessary. 13 I mean, and the other issue is if you're 14 handing exhibits up to me and they have a 15 numbered sticker on them, okay, that's fine, 16 the first time I'll have it in front of me. 17 But then when you start to use that one 18 again, I'm going to have to go find it and you 19 all will not have given me a notebook or a box 20 of folders with exhibit numbers on it. Do you 21 understand my logistical concern? 22 MR. McDEVITT: Well, our thought is, at 23 least from our perspective -- 24 THE COURT: I had this problem. I'm not 25 making this up.</p>
<p style="text-align: right;">Page 15</p> <p>1 be -- that it's going to be closer to 50. We, 2 like them, we really don't know yet. Except I 3 know we're not going to be introducing all of 4 the things we've identified. They probably 5 won't, either. 6 MR. ALUL: I can assure the Court, Your 7 Honor, we are not going to be introducing a 8 thousand exhibits at trial, nowhere near that. 9 THE COURT: Okay. That's good to know. 10 MR. McDEVITT: And that's the same with 11 us. 12 THE COURT: I would have trouble reading 13 that much. I would have to take off all of 14 next year. But, of course, you could. Of 15 course, you can put in whatever you need to. 16 Well, just a second. Let me confer with 17 the clerk for a moment. 18 (Discussion held off the record.) 19 THE COURT: Let me ask you one more 20 question, as soon as she turns the mic back on. 21 So are there going to be exhibits that are used 22 repeatedly with witness after witness after 23 witness? 24 MR. McDEVITT: A few. 25 THE COURT: Um-hum.</p>	<p style="text-align: right;">Page 17</p> <p>1 MR. McDEVITT: When we examine a witness, 2 our plan is to hand you up a notebook that have 3 all the exhibits properly tabbed and numbered. 4 THE COURT: For that witness? 5 MR. McDEVITT: That's correct. And if we 6 duplicate the exhibit for another witness, it 7 will be repeated. 8 THE COURT: All right. If you all are 9 going to do that. 10 MR. McDEVITT: So if it's plaintiffs' 11 exhibit, then we'll have Plaintiffs' Exhibit 3 12 again. 13 MR. ALUL: That's exactly what we're 14 planning on doing. 15 THE COURT: Okay. I'm good. So if you'll 16 just file the electronic copy then with the 17 clerk, of everything that you think you will 18 possibly use, just so I'll have an electronic 19 copy, and I can sort through that along the 20 way. And then we can do the paper ones the way 21 you all suggested. 22 MR. ALUL: Thank you, Your Honor. 23 MR. McDEVITT: And that is handing them up 24 at the time we examine the witness. 25 THE COURT: Yes. Now, are you going to be</p>

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<p style="text-align: right;"><b>Page 18</b></p> <p>1 able to do that for cross-examination, too?</p> <p>2 Because I did have that same -- sometimes</p> <p>3 people are unwilling to say in advance what</p> <p>4 documents they're going to use in</p> <p>5 cross-examination.</p> <p>6 But I just need to be sure I've got -- and</p> <p>7 that's going to work both ways as well.</p> <p>8 MR. ALUL: We'll be handing cross binders</p> <p>9 up to the Court at the outset of each</p> <p>10 cross-examination, Your Honor.</p> <p>11 THE COURT: Okay. All right. So you all</p> <p>12 will be doing that, too?</p> <p>13 MR. McDEVITT: Your Honor, yes. That's</p> <p>14 our plan. But, of course, as with</p> <p>15 cross-examination, we have the binders and we</p> <p>16 may -- I would think both sides may say wait a</p> <p>17 minute, there's another exhibit, where you have</p> <p>18 a binder that's relevant.</p> <p>19 THE COURT: As long as that doesn't happen</p> <p>20 too hardly often, that ought to be okay. I</p> <p>21 just -- you know, it sounds like there's going</p> <p>22 to be a lot of paper and I need to have it all</p> <p>23 in front of me.</p> <p>24 You all are going to have it up on</p> <p>25 screens, too, so that will facilitate, I</p>	<p style="text-align: right;"><b>Page 20</b></p> <p>1 of exhibits, and our plan was to just use that</p> <p>2 number. So it could be ten, 112.</p> <p>3 THE COURT: Absolutely. No problem.</p> <p>4 MR. FRUTH: Not duplicate it.</p> <p>5 THE COURT: Yes. There's no reason to --</p> <p>6 it drives me crazy during a trial to write the</p> <p>7 number on the sticker and put the sticker on</p> <p>8 the document.</p> <p>9 And so yeah, we'll just use -- if you end</p> <p>10 up skipping big chunks of numbers, that's</p> <p>11 absolutely fine.</p> <p>12 Okay. So first I'm -- I'm assuming that</p> <p>13 the defendants are going to be working</p> <p>14 together, that one person will be examining a</p> <p>15 witness when you're putting on your evidence</p> <p>16 and one person will be cross -- everybody's</p> <p>17 nodding okay.</p> <p>18 MR. ALUL: Yes, Your Honor.</p> <p>19 THE COURT: Okay. Great. That makes it a</p> <p>20 lot simpler. So as I understand it, the</p> <p>21 defendants actually have the initial burden of</p> <p>22 proof; correct, Defendants?</p> <p>23 MR. ALUL: Actually, Your Honor, we</p> <p>24 believe that plaintiffs maintain the burden of</p> <p>25 proof with respect to infringement.</p>
<p style="text-align: right;"><b>Page 19</b></p> <p>1 assume.</p> <p>2 MR. McDEVITT: That will be fine. You</p> <p>3 know, it will take the fun out of it, no trial</p> <p>4 by ambush.</p> <p>5 THE COURT: All right. Okay. That's fine</p> <p>6 then.</p> <p>7 MR. McDEVITT: Thank you, Your Honor.</p> <p>8 MR. ALUL: Thank you, Your Honor.</p> <p>9 THE COURT: So what you'll need to do at</p> <p>10 the beginning of each witness is you'll need</p> <p>11 the original exhibits, which the clerk -- the</p> <p>12 clerk will have to have the original one</p> <p>13 exhibit. I'll need a copy and I'll -- I would</p> <p>14 like one for my law clerk. So --</p> <p>15 MR. ALUL: We were planning on showing up</p> <p>16 with about seven or eight exhibit binders each</p> <p>17 day for a particular witness.</p> <p>18 THE COURT: Great. Great. And you all</p> <p>19 will be exchanging them to make it easier for</p> <p>20 each other as well?</p> <p>21 MR. ALUL: Yes, Your Honor.</p> <p>22 THE COURT: All right. Good. Great.</p> <p>23 Wonderful.</p> <p>24 MR. FRUTH: Your Honor, I want to clarify</p> <p>25 one point. We have prenumbered these thousands</p>	<p style="text-align: right;"><b>Page 21</b></p> <p>1 THE COURT: Yes. But you all have the</p> <p>2 burden to prove invalidity.</p> <p>3 MR. ALUL: That's correct, Your Honor.</p> <p>4 THE COURT: Okay. All right. Well, the</p> <p>5 infringement is --</p> <p>6 MR. ALUL: We have not stipulated to</p> <p>7 infringement, Your Honor. We believe they</p> <p>8 still have the burden of proving the</p> <p>9 infringement.</p> <p>10 THE COURT: Okay. That's right. In this</p> <p>11 case is everybody anticipating the plaintiffs</p> <p>12 go first?</p> <p>13 MR. McDEVITT: Yes, Your Honor.</p> <p>14 THE COURT: Are you going to go ahead and</p> <p>15 put on everything or are you going to focus on</p> <p>16 infringement and then they're going to put on</p> <p>17 their case about invalidity and rebut your</p> <p>18 infringement? Is that how we're going to do</p> <p>19 it?</p> <p>20 MR. McDEVITT: The latter way that you've</p> <p>21 described is what the plaintiff anticipates.</p> <p>22 MR. ALUL: That's what we anticipate as</p> <p>23 well, Your Honor.</p> <p>24 THE COURT: Okay. Plaintiff goes first</p> <p>25 with evidence.</p>

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<p style="text-align: right;">Page 22</p> <p>1 MR. ALUL: We rebut that.</p> <p>2 THE COURT: At the same time you rebut</p> <p>3 their evidence and you put on your evidence of</p> <p>4 invalidity.</p> <p>5 MR. ALUL: Yes, that's essentially what we</p> <p>6 were anticipating, Your Honor. Infringement,</p> <p>7 our rebuttal case to that, our case in chief</p> <p>8 for invalidity, they rebut that.</p> <p>9 They may come forward with secondary</p> <p>10 consideration testimony and we'll come back and</p> <p>11 respond to that, and that's how it will end.</p> <p>12 THE COURT: Okay. We're going back and</p> <p>13 forth. I anticipate or suggest that we start</p> <p>14 at 9:30 everyday and go until about 12:30.</p> <p>15 We'll take a short break in the middle of the</p> <p>16 morning.</p> <p>17 It would be my preference to just take an</p> <p>18 hour for lunch, come back at 1:30 and stop at</p> <p>19 4:30. But if you all have strong feelings, we</p> <p>20 can take a longer lunch break and go from 2 to</p> <p>21 5 or 1:40 to 4:45. But I would prefer a</p> <p>22 shorter lunch and stop a little earlier at the</p> <p>23 end of the day.</p> <p>24 MR. McDEVITT: We also would prefer to get</p> <p>25 the most trial time we can possibly get.</p>	<p style="text-align: right;">Page 24</p> <p>1 So, does everybody still think that that's</p> <p>2 enough? That's five, six, seven, eight days.</p> <p>3 MR. ALUL: We anticipate that will be</p> <p>4 enough for defendants, Your Honor.</p> <p>5 MR. McDEVITT: We think so, Your Honor.</p> <p>6 We're -- I guess everybody's hopeful if we</p> <p>7 could finish it all in one week, we could. To</p> <p>8 be candid with you, we intend to think that we</p> <p>9 may need to go into the 13th to finish things</p> <p>10 up, just looking at what we know so far about</p> <p>11 their case and ours. We're really hopeful --</p> <p>12 THE COURT: Okay.</p> <p>13 MR. McDEVITT: -- that we won't get to get</p> <p>14 to the 19th and 20th.</p> <p>15 THE COURT: Good.</p> <p>16 MR. McDEVITT: But we thank you for</p> <p>17 holding those dates aside.</p> <p>18 THE COURT: So it sounds like I don't need</p> <p>19 to put any time limits on you. You read these</p> <p>20 books about how to try patent cases and they</p> <p>21 say make them do it in 20 hours.</p> <p>22 It sounds like I don't need to do that,</p> <p>23 that you all are doing pretty well with this</p> <p>24 working together.</p> <p>25 MR. ALUL: We would agree, Your Honor.</p>
<p style="text-align: right;">Page 23</p> <p>1 THE COURT: Yes.</p> <p>2 MR. McDEVITT: So we would support the</p> <p>3 shorter lunch break.</p> <p>4 MR. ALUL: Absolutely, Your Honor.</p> <p>5 THE COURT: All right. Great. It's what</p> <p>6 we'll do, 9:30 to 12:30 and 1:30 to 4:30. Now,</p> <p>7 if you've got a witness on the stand and</p> <p>8 they're trying to get out on a 6:30 flight, and</p> <p>9 we need to stay a little bit longer, I'll work</p> <p>10 with you all about that.</p> <p>11 Or if we -- and, of course, if we run into</p> <p>12 time problems and we need to lengthen the court</p> <p>13 day we can do that. I just know five and a</p> <p>14 half hours of court time is actually a lot. A</p> <p>15 lot of listening.</p> <p>16 So I would prefer not to lengthen them</p> <p>17 much if possible. And because we are going to</p> <p>18 have some time constraints, we'll -- on Monday</p> <p>19 the 5th we will work that whole week on that</p> <p>20 schedule Monday through Friday.</p> <p>21 We've already been over this. The next</p> <p>22 week we will only be in court on that Tuesday</p> <p>23 the 13th, and then I'll be available the 19th</p> <p>24 and 20th the following week for time to finish</p> <p>25 things up.</p>	<p style="text-align: right;">Page 25</p> <p>1 THE COURT: If things go south I'll impose</p> <p>2 them, but I'll just rely on you all for that.</p> <p>3 MR. McDEVITT: Could I ask you a question</p> <p>4 about that, Your Honor?</p> <p>5 THE COURT: Yes.</p> <p>6 MR. McDEVITT: I don't know what the</p> <p>7 defendants' view of this will be. Given the</p> <p>8 timing, without any bad faith on anyone's part,</p> <p>9 it's possible that things inadvertently could</p> <p>10 get out of hand timingwise for either side.</p> <p>11 Our thought is I don't know about putting</p> <p>12 a stopwatch on it, but if we went into the</p> <p>13 trial with the view that let's say</p> <p>14 presumptively, the trial would go the five</p> <p>15 days, and maybe the 13th, and using that as a</p> <p>16 template, that each side would get equal time</p> <p>17 with their evidence, that would put some</p> <p>18 pressure on both sides to be mindful of the</p> <p>19 clock and what they have to do.</p> <p>20 And we tend to think if it's -- if we go</p> <p>21 into it with that approach that that could work</p> <p>22 some efficiencies in the trial for the Court,</p> <p>23 as well as both sides, and while we -- you</p> <p>24 know, we'd love to have more time. We think</p> <p>25 sort of an equal split would be fair to start</p>

<p style="text-align: right;">Page 26</p> <p>1 with, if you could think about that.</p> <p>2 MR. ALUL: Your Honor, we anticipate an</p> <p>3 equal split in time. But like Your Honor</p> <p>4 suggested, I mean, if things end up going south</p> <p>5 we can start imposing more rigorous limits.</p> <p>6 Limitations, time limits, things like that.</p> <p>7 But for now we anticipate that each party</p> <p>8 should be able to -- will get equal time.</p> <p>9 THE COURT: Yes. I mean, that sounds</p> <p>10 fair. And, of course, your time is -- includes</p> <p>11 your cross-examination of the other side's</p> <p>12 witness, which is where things -- usually</p> <p>13 people do pretty well on their direct.</p> <p>14 But people sometimes get caught up in</p> <p>15 cross-examination and, you know, sometimes</p> <p>16 quite understandably. So yeah, your</p> <p>17 cross-examination time comes out of your time,</p> <p>18 not the other person's time.</p> <p>19 All right. Yeah, roughly even. That</p> <p>20 sounds appropriate. And we'll keep up with it,</p> <p>21 roughly.</p> <p>22 MR. McDEVITT: Thank you, Your Honor.</p> <p>23 THE COURT: Okay. Now, I was thinking I</p> <p>24 don't know how long you all think you need for</p> <p>25 opening statements. You've already educated me</p>	<p style="text-align: right;">Page 27</p> <p>1 a good bit about this case. On the other hand,</p> <p>2 I would probably like to have you make some</p> <p>3 sort of opening statement in the real sense of</p> <p>4 here are our witnesses, this witness is going</p> <p>5 to say this, the next -- that kind of opening</p> <p>6 statement, not an argument opening statement.</p> <p>7 So I would probably find that fairly</p> <p>8 helpful, but I don't want to use up a whole lot</p> <p>9 of time on it when you've got a lot of</p> <p>10 witnesses to get through. So I was thinking</p> <p>11 maybe 30 minutes each.</p> <p>12 MR. McDEVITT: That sounds great.</p> <p>13 MR. ALUL: That's what we were going to</p> <p>14 suggest, Your Honor. We can supply the Court</p> <p>15 with a roadmap of essentially where we're going</p> <p>16 in like 20 or 30 minutes.</p> <p>17 THE COURT: That sounds perfect. All</p> <p>18 right. And then your closing argument, you</p> <p>19 know, we can see how it goes. I'm going to let</p> <p>20 you file post-trial briefs, and we can -- I</p> <p>21 don't know that I would make you come back to</p> <p>22 do closing arguments if we finish the evidence</p> <p>23 on Tuesday the 13th, you know.</p> <p>24 But, I mean, we can leave that open, if</p> <p>25 you all want, at this point and just see where</p>	<p style="text-align: right;">Page 28</p> <p>1 we are in the trial and, you know, with the</p> <p>2 thought that maybe you'll take 30 minutes or so</p> <p>3 at the end of the case and make a closing</p> <p>4 argument.</p> <p>5 MR. ALUL: We would prefer the option, or</p> <p>6 keeping at least the option open, Your Honor,</p> <p>7 of maybe coming back for closings. But yes,</p> <p>8 we're interested in doing closing statements as</p> <p>9 well.</p> <p>10 MR. McDEVITT: And plaintiffs are too,</p> <p>11 Your Honor.</p> <p>12 THE COURT: All right.</p> <p>13 MR. McDEVITT: We certainly don't expect</p> <p>14 lengthy closing arguments in a bench trial, but</p> <p>15 we would like for the chance to synthesize</p> <p>16 and -- and sort of rehash our main positions.</p> <p>17 THE COURT: Well, I would like for you to</p> <p>18 do that. And, of course, I'll be here on the</p> <p>19 19th and 20th and, you know, we can. I'm happy</p> <p>20 to.</p> <p>21 MR. McDEVITT: We'd be willing to come</p> <p>22 back.</p> <p>23 THE COURT: All right.</p> <p>24 MR. ALUL: Absolutely.</p> <p>25 THE COURT: Well, we'll leave it open and</p>	<p style="text-align: right;">Page 29</p> <p>1 plan on 30 minutes or so for your closing</p> <p>2 arguments when we get to it maybe a little</p> <p>3 longer, depending on how confused I've gotten.</p> <p>4 If that sounds okay.</p> <p>5 MR. McDEVITT: Your Honor, when you said</p> <p>6 post-trial briefs, which we certainly would</p> <p>7 like to do, does that include -- we're going to</p> <p>8 be filing with you a proposed judgment with</p> <p>9 findings of fact and conclusions of law.</p> <p>10 THE COURT: Yeah, it does. I'm going to</p> <p>11 let you submit revised ones.</p> <p>12 MR. McDEVITT: That's included with --</p> <p>13 THE COURT: It says so right here. Yeah.</p> <p>14 I mean, I assume that after the evidence would</p> <p>15 actually be in, however well you all have</p> <p>16 prepared. Sometimes it comes in a little bit</p> <p>17 different.</p> <p>18 So I do want it before trial, that's going</p> <p>19 to help me prepare. But I will give you a</p> <p>20 chance to submit revised findings, proposed</p> <p>21 findings of fact and conclusions of law along</p> <p>22 with your post-trial briefs.</p> <p>23 And what I would suggest about that is</p> <p>24 that each of you file your -- file them at the</p> <p>25 same time and then I'll -- we'll give you a</p>
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<p style="text-align: right;">Page 30</p> <p>1 little time to respond to the other side's. 2 But rather than one side go first, because of 3 the way this case works. 4 So that's what I would propose. You know, 5 I could set the date -- the specific dates for 6 those at the end of the trial. Once we know 7 when the trial is over. 8 But I will say I would prefer that -- I'm 9 not going to give you a lot of time. Because I 10 do better when I have things fresh in my mind. 11 So, you know, I'll be looking at a couple of 12 weeks. For -- 13 MR. McDEVITT: That will be fine, Your 14 Honor. We'd like that, too. 15 THE COURT: All right. And we'll just -- 16 I'll set the time for that once the trial 17 itself is over. But you all should expect it 18 to be pretty short, a couple of weeks, and then 19 maybe a week to respond to the other side's, 20 something like that. 21 I would propose -- I forgot this. At the 22 close of each -- we did do this, really, if you 23 all agree on it, I'm amenable to however you 24 want, but I do like everybody to know certainly 25 no later than close of business who the</p>	<p style="text-align: right;">Page 32</p> <p>1 would just make it more efficient for everyone 2 if we did it two days out with identification 3 and witnesses and, you know -- so but we'll 4 certainly talk with him about that and get back 5 to you if you want. 6 THE COURT: All right. Yeah, I'm happy 7 for you all to agree. I will require you, at 8 the latest, to do it, you know, close of 9 business on -- well, close of business on 10 Friday before the trial starts on Monday. 11 You'll have to say who your witnesses are 12 for Monday. And close of business on Monday, 13 if you're still putting on your case, you 14 all -- that's what I will require. 15 But I'm happy for you all to agree on 16 giving each other more notice. Because, 17 obviously, what goes around comes around. 18 MR. McDEVITT: Right. 19 THE COURT: So yeah. And you'll exchange 20 your exhibits as well. Everybody's prepared on 21 that. All right. Good. Now, Rule 26 requires 22 you all to disclose your deposition 23 designations. I think you've got to do that -- 24 actually, you already did that; right? 25 MR. McDEVITT: We have.</p>
<p style="text-align: right;">Page 31</p> <p>1 witnesses are going to be the next day. 2 If you'll want to agree on giving each 3 other more notice of that, then I'm agreeable 4 to that. If we're going to be able to try it 5 in five or six days, you know, maybe it's not 6 quite as important. 7 Because -- but I do think everybody needs 8 to clearly know who the witnesses are going to 9 be tomorrow. 10 MR. ALUL: We agree, Your Honor. As I 11 said earlier, we're still developing our trial 12 strategy. That's going to play into how much 13 lead time we'd like as far as disclosures of 14 witnesses that are going to be put up on the 15 stand for direct examination on a particular 16 day and what exhibits are going to be used in 17 that direct examination. 18 So we would ask if the parties be allowed 19 to meet later on this month and come to 20 agreement on a date, whether it's 24 hours in 21 advance or 48 hours in advance on that. 22 MR. McDEVITT: We're fine with that, Your 23 Honor. 24 THE COURT: All right. 25 MR. McDEVITT: Actually, our thought is it</p>	<p style="text-align: right;">Page 33</p> <p>1 THE COURT: And you have to file your 2 objections next week sometime. Late at the end 3 of the week. Are there going to be -- what are 4 you all anticipating about deposition? 5 I'm trying to get my mind around this. 6 Are you going to have like five or six pages 7 from a deposition or are people going to be 8 submitting entire depositions? 9 MR. McDEVITT: From the plaintiffs' side, 10 Your Honor, it's kind of a multiple approach 11 here. Most of the depositions were videotaped. 12 Our expectation is that we would play 13 designated portions of some depositions for you 14 to view. 15 Our thought is with some others, depending 16 on what you prefer, that we might hand up the 17 copy of the deposition transcript with the 18 sections marked for you to read. 19 Or certainly, we can read it in open court 20 and enter it in the record. So we've got kind 21 of two ways of doing it. We don't propose to 22 submit to the Court all of the depositions that 23 have been taken in this case. 24 THE COURT: That's good. 25 MR. McDEVITT: We've gone through and</p>

ALLERGAN, INC., ET AL. -vs- APOTEX, INC., ET AL.  
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<p style="text-align: right;">Page 34</p> <p>1 tried to pick out the parts that we think are 2 germane, really, to the trial. 3 THE COURT: All right. 4 MR. McDEVITT: So we're -- we will do it 5 any way you want to, but we would like to be 6 able to play some portions. And then the 7 other, if you want us to hand it up and you 8 read it or you want us to read it into the 9 record in court, we can do it whichever way you 10 want to. 11 THE COURT: All right. 12 MR. ALUL: Your Honor, our only concern 13 with that is that both sides of us have quite a 14 few witnesses on the may call portion of the 15 Rule 26(A)(3) disclosures. 16 And as I mentioned, we're still developing 17 our trial strategy. I have no idea what 18 plaintiffs are going to do, but I anticipate 19 both sides are going to be presenting paper 20 witnesses that could eat up a lot of time from 21 the five or six or seven days we've allotted 22 for trial. 23 So we certainly don't intend -- most of 24 defendants' depositions were recorded 25 stenographically, not videotaped. We do not</p>	<p style="text-align: right;">Page 36</p> <p>1 me stuff I have to wade through that's full of 2 repetitive, not helpful stuff. 3 But if you all are going to go through it, 4 I'm happy to read it and not take court time 5 for that. 6 MR. ALUL: That was exactly our intention. 7 THE COURT: Now, if there is something 8 that you think you really want to put on in the 9 courtroom, either video or you want to read a 10 page or two, I don't really have a problem with 11 that. 12 We have a limited amount of time. If you 13 all want to spend your time, if there's 14 something important enough that you want to do 15 that I'm not going to prevent you from doing 16 it, at least not as long as we have time to do 17 it. 18 But I'm happy to receive them and read 19 them, so long as you all do what you said and 20 really give to me the parts that I need to 21 have. 22 MR. McDEVITT: That's the plan. 23 THE COURT: All right. That's great. 24 MR. McDEVITT: We are working already and 25 already have done some culling. In fact, one</p>
<p style="text-align: right;">Page 35</p> <p>1 intend on handing up full transcripts. We're 2 going to be abbreviated. They're going to be 3 targeted and they're going to be highlighted 4 and condensed. 5 So we would prefer, if it's acceptable to 6 the Court, to just hand paper witness 7 transcripts. 8 Or in their case, in some cases I guess 9 videotapes at the end of the parties' case in 10 chief, or whatever. If the Court would prefer 11 to have a certain deposition transcript read or 12 videotape played, we could do that. 13 But our concern is that if every paper 14 witness had to be read into the record, that 15 could really eat up a lot of time. 16 THE COURT: Well, I'm not -- again, it 17 sort of depends on how much of this we're 18 talking about. But if you all are going to 19 cull the depositions and just give me what I 20 need and be selective. 21 MR. McDEVITT: We are. 22 THE COURT: So that I -- if it were a live 23 witness I'd be sitting up here saying Rule 403, 24 move along, Counsel. But I can't do that with 25 the depositions. But I don't want you giving</p>	<p style="text-align: right;">Page 37</p> <p>1 of the things that we would ask you to 2 consider, and ask the other side to consider 3 too, we are going to voluntarily provide -- 4 we've done our deposition designation. 5 We're going to voluntarily provide by I 6 think it's the 15th, our counter designations. 7 We think that's a good, efficient thing to do. 8 THE COURT: Um-hum. 9 MR. McDEVITT: And I don't know whether 10 you may require it or what, but we think that 11 would move things along if we get that done 12 pretty soon, here in mid October. 13 THE COURT: I guess that's not really 14 covered by the rule, is it? 15 MR. McDEVITT: No, that's not, Your Honor. 16 Which is why we're voluntarily doing it. 17 MR. ALUL: And we were fine with doing 18 that, Your Honor. I think we had informally 19 agreed to maybe the 15th to exchange counter 20 designations and objections to their 21 designations. We're fine with that. 22 THE COURT: All right. 23 MR. ALUL: I was just going to say, Your 24 Honor, we just had one other concern. We're 25 still analyzing Rule 26(A)(3) disclosures and</p>

<p style="text-align: right;">Page 38</p> <p>1 their witness list.</p> <p>2 Just off the top of our head, some of the</p> <p>3 witnesses they cited appears that are on their</p> <p>4 list, that they may present as paper witnesses,</p> <p>5 may be witnesses they still have control over.</p> <p>6 And we would certainly have objections to</p> <p>7 that. We think if they do have over -- control</p> <p>8 over these people, they need to bring them into</p> <p>9 court.</p> <p>10 And so we just wanted to give the Court a</p> <p>11 little bit of notice that we are going to have</p> <p>12 an objection like that to the extent that they</p> <p>13 are going to seek to present a witness, paper</p> <p>14 witness, at trial, that in reality they still</p> <p>15 have control over, we're going to have</p> <p>16 objections to it.</p> <p>17 THE COURT: Okay. Well, as I read Rule</p> <p>18 26, you do have to file your objections to</p> <p>19 deposition designations and admissibility of</p> <p>20 exhibits by I guess the 19th.</p> <p>21 And so that kind of objection could</p> <p>22 certainly be noted by then. But thank you for</p> <p>23 giving me the heads up. I hope you all will be</p> <p>24 able to work that out. But if not, that's</p> <p>25 good.</p>	<p style="text-align: right;">Page 39</p> <p>1 All right. Good. So you're going to do</p> <p>2 counter designations on the 15th, and that</p> <p>3 sounds like that will save some time and be</p> <p>4 helpful. And objections to any counter</p> <p>5 designations, you do it by the 19th.</p> <p>6 MR. McDEVITT: Yes, Your Honor. We think</p> <p>7 we can do that by the 19th.</p> <p>8 THE COURT: Okay. Great. Wonderful. All</p> <p>9 right. If you're going to use any</p> <p>10 lawyer-created, demonstrative exhibits during</p> <p>11 opening or closing, you would certainly need to</p> <p>12 exchange those.</p> <p>13 Somebody, I think, expressed some concern</p> <p>14 about that. But -- now, what I have left --</p> <p>15 oh, okay. So I didn't schedule a settlement</p> <p>16 conference. I think I said I wasn't going to.</p> <p>17 Didn't I?</p> <p>18 MR. McDEVITT: Yes.</p> <p>19 THE COURT: All right. Good. So if you</p> <p>20 all want to settle it, go ahead. We've got a</p> <p>21 Motion in Limine left to talk about. Two of</p> <p>22 them have been filed, one of them, a response,</p> <p>23 has been filed.</p> <p>24 But before we get to that, what other</p> <p>25 housekeeping matters have I not addressed that</p>
<p style="text-align: right;">Page 40</p> <p>1 you all wanted to talk about? I may not have</p> <p>2 covered everything on the plaintiffs' list,</p> <p>3 but --</p> <p>4 MR. McDEVITT: Would you like me to speak</p> <p>5 to those, Your Honor?</p> <p>6 THE COURT: That would be fine.</p> <p>7 MR. McDEVITT: Mr. Singer is going to be</p> <p>8 talking about two issues on our list, but let</p> <p>9 me sort of get mine out of the way.</p> <p>10 Do you have a preference about whether we</p> <p>11 use a projector with a screen or electronic</p> <p>12 monitors?</p> <p>13 THE COURT: I've got a screen, you put the</p> <p>14 screen -- a bigger monitor right up on the</p> <p>15 bench, which has worked well for me in the</p> <p>16 past, and seems to be less obstructive of sight</p> <p>17 views than a screen and a projector.</p> <p>18 But if that's all right with everybody.</p> <p>19 And you all -- I think you can put monitors up</p> <p>20 on your tables. So if that's --</p> <p>21 MR. McDEVITT: I don't think we</p> <p>22 particularly care. We just wanted to find out</p> <p>23 what your preference was, Your Honor.</p> <p>24 THE COURT: You know, I don't know</p> <p>25 anything about what anything costs anymore. If</p>	<p style="text-align: right;">Page 41</p> <p>1 it's easier to have a big screen over there in</p> <p>2 front of the jury box, I'm okay with that. But</p> <p>3 I would just ask you all to do the same thing</p> <p>4 whatever you do, so that we don't have to go</p> <p>5 back and forth between two different things.</p> <p>6 The monitors, if I could just ask you to</p> <p>7 work with the clerk and our IT people on that,</p> <p>8 you know, because I believe we're able to put a</p> <p>9 monitor up on the witness box; right?</p> <p>10 MS. SANDERS: Yes.</p> <p>11 THE COURT: So I'll let you all work with</p> <p>12 them about that. I don't really care. With a</p> <p>13 jury I strongly prefer the monitors because the</p> <p>14 projectors are kind of difficult.</p> <p>15 But I don't really have a preference.</p> <p>16 Whatever you all agree on that's easiest and</p> <p>17 cheapest is okay with me, as long as the clerk</p> <p>18 and our IT people say it's okay. All right.</p> <p>19 MR. McDEVITT: One of the things that</p> <p>20 we've not been able to resolve among the</p> <p>21 parties, we feel like that -- I mean, the</p> <p>22 parties can supplement their exhibit list.</p> <p>23 We feel like that there needs to be some</p> <p>24 sort of deadline on that, and we're proposing</p> <p>25 that the parties can supplement their exhibit</p>

<p style="text-align: right;">Page 42</p> <p>1 list by October the 19th. We probably need 2 some guidance from you about that. 3 It seems to us that having some sense the 4 parties at least know what's on the list. 5 Whether they use it or not is another issue. 6 We're willing to have ours done by the end and 7 would like for the defendants to do the same. 8 But I really wanted to mention that to you 9 to inquire as to whether or not the Court had 10 any thoughts about the wisdom of that 11 procedure. 12 THE COURT: Okay. 13 MR. ALUL: Your Honor, it's our 14 understanding that the local rules don't really 15 contemplate any supplementation of the exhibit 16 list under Rule 26(A) (3). 17 We prepared some pretty comprehensive -- a 18 pretty comprehensive trial exhibit list. So we 19 wouldn't necessarily object outright to this 20 idea that the parties be allowed to supplement 21 their trial exhibit list, but what we would ask 22 is that maybe a good requirement be attached to 23 it. 24 THE COURT: Okay. 25 MR. McDEVITT: Your Honor, I don't know</p>	<p style="text-align: right;">Page 44</p> <p>1 people say oh, I left out this one. And I 2 would assume you all would be working with each 3 other if somebody -- if you left out three or 4 four exhibits, there's not going to be any 5 problem. 6 If somebody's talking about supplementing 7 with 30 or 40 exhibits, I think that's a 8 problem. So if you have -- if either side has 9 identified exhibits that weren't initially 10 disclosed, you don't need to be waiting on any 11 deadline to supplement, you need to be turning 12 them over as you discover them and identified. 13 And as long as there's only, you know, 14 three or four or five or six, or some number 15 like -- I don't know what the number would be 16 where it would stop being reasonable, but that 17 probably depends on how you all are -- if one 18 side has ten and the other side has ten, then 19 ten is probably reasonable. 20 But if one of you starts showing up with 21 30 or 40 documents, I would probably have a bit 22 of a problem with that. 23 MR. ALUL: That's our concern, Your Honor. 24 THE COURT: So I'm not going to be excited 25 about that. I'm going to let you all work this</p>
<p style="text-align: right;">Page 43</p> <p>1 that we would particularly resist that. It 2 seems kind of unnecessary. Both parties have 3 been working like crazy, they've got over a 4 thousand, we've got over 700. 5 It's -- we've made a good faith disclosure 6 as attorneys and officers of the court of where 7 we are today. It may be that we found some 8 others. 9 We're not going to double the number of 10 exhibits, but we just recognize that there 11 probably are some that need to be out there and 12 included in the list that we didn't find the 13 first time. 14 If they don't have any of those, well 15 that's -- you know, that's great for them. 16 Fine. I would be surprised at that. But I 17 don't particularly see any need to take the 18 Court's time of having to review the exhibits 19 and find good cause or not. 20 I think counting on us to practice law, to 21 be good lawyers and deal in good faith ought to 22 be sufficient. 23 THE COURT: Well, the rules don't 24 contemplate supplementing the exhibit list but, 25 you know, I think we all know, in reality, some</p>	<p style="text-align: right;">Page 45</p> <p>1 out on your own and if you -- if somebody 2 starts being unreasonable about this and the 3 numbers get up, you know, much over ten, I 4 would have -- you know, you're supposed to 5 provide them. 6 But I'm sensing, you know, sometimes you 7 look at the other person's exhibit list and you 8 say oh, duh. And if it's responsive to the 9 other person's list and something for some 10 reason didn't occur to you, well you kind of 11 understand a few exhibits here or there. But, 12 you know, you all have been working on this 13 case a long time. 14 MR. McDEVITT: Your Honor, are you going 15 to put a deadline on us or is that just open up 16 till trial? 17 THE COURT: I am not giving you any 18 additional time to exchange exhibits. But I'm 19 relying on you all to give each other some 20 professional courtesy on that. 21 And if you need to come to me, if a 22 problem develops specifically, then you can 23 come. But I'm assuming you all will work with 24 each other to a reasonable extent and that 25 nobody's going to be coming up with a whole lot</p>

<p style="text-align: right;">Page 46</p> <p>1 of extra exhibits here.</p> <p>2 MR. McDEVITT: We're certainly not.</p> <p>3 THE COURT: That's my general view about</p> <p>4 it.</p> <p>5 MR. ALUL: We completely agree, Your</p> <p>6 Honor. If we're talking about three or four</p> <p>7 exhibits, after looking at our exhibit list,</p> <p>8 that they want to add in response, that's fine.</p> <p>9 But our concern is that they're</p> <p>10 essentially trying to move the Rule 26(A)(3)</p> <p>11 deadline, and that's what we don't want.</p> <p>12 MR. McDEVITT: We were not trying to do</p> <p>13 that.</p> <p>14 THE COURT: Good. Well, then I think you</p> <p>15 all can work this out. All right. What else</p> <p>16 have I not addressed that somebody thinks I</p> <p>17 need to address?</p> <p>18 MR. McDEVITT: Your Honor, give me just a</p> <p>19 minute, if you would, to -- oh, on the</p> <p>20 demonstrative exhibits that we might use in</p> <p>21 opening statements, or even closing, we didn't</p> <p>22 talk about any timing.</p> <p>23 And my assumption is that if each side</p> <p>24 gets them to the other 24 hours in advance, or</p> <p>25 whatever it is, that's okay.</p>	<p style="text-align: right;">Page 48</p> <p>1 me. I would like you to exchange them, so</p> <p>2 whatever you all agree on is fine with me.</p> <p>3 MR. McDEVITT: Your Honor, Mr. Singer</p> <p>4 would like to address a couple of matters,</p> <p>5 including our Motion in Limine, and some</p> <p>6 production discovery issues.</p> <p>7 THE COURT: Okay. I don't want to talk</p> <p>8 about the Motion in Limine yet, because I want</p> <p>9 to get through all the housekeeping matters</p> <p>10 first.</p> <p>11 MR. McDEVITT: I believe that that</p> <p>12 concludes my housekeeping, Your Honor.</p> <p>13 THE COURT: Okay.</p> <p>14 MR. McDEVITT: And thank you very much.</p> <p>15 You got most of it.</p> <p>16 THE COURT: All right. Housekeeping for</p> <p>17 the defense.</p> <p>18 MR. ALUL: Nothing from the defense.</p> <p>19 THE COURT: Okay. So on my list then that</p> <p>20 leaves the motion just -- we can have a</p> <p>21 housekeeping discussion first about the Motions</p> <p>22 in Limine, and then did you say there was a</p> <p>23 discovery issue?</p> <p>24 MR. McDEVITT: Yes, Your Honor.</p> <p>25 THE COURT: Okay. So the two Motions in</p>
<p style="text-align: right;">Page 47</p> <p>1 THE COURT: Yes. Trial is going to start</p> <p>2 on Monday. I would hope you get them to each</p> <p>3 other by Friday.</p> <p>4 MR. McDEVITT: All right. That's fine.</p> <p>5 We can do that.</p> <p>6 THE COURT: You don't have to identify --</p> <p>7 I'm going to let -- if you want to use regular</p> <p>8 exhibits in your opening statement, that's</p> <p>9 certainly fine.</p> <p>10 MR. McDEVITT: Certainly.</p> <p>11 THE COURT: And you don't need to identify</p> <p>12 those. I'm just talking about counsel created.</p> <p>13 I don't know summaries or chart. I don't know</p> <p>14 what you all might do. I just would like</p> <p>15 people to be aware of those in advance.</p> <p>16 MR. ALUL: Your Honor, just some</p> <p>17 clarification. Is the Court mandating a Friday</p> <p>18 disclosure or can we work with counsel or</p> <p>19 plaintiffs and come to maybe a Sunday or</p> <p>20 Saturday?</p> <p>21 THE COURT: You all can agree on a later</p> <p>22 deadline.</p> <p>23 MR. McDEVITT: Friday or later as agreed.</p> <p>24 THE COURT: Later as agreed. Sounds like</p> <p>25 you all want later as agreed. That's fine with</p>	<p style="text-align: right;">Page 49</p> <p>1 Limine that I saw, unless you all filed</p> <p>2 something this morning or late yesterday</p> <p>3 afternoon, there was the defendants' motion on</p> <p>4 the alleged invention date, and that one was</p> <p>5 just filed the other day, no reply yet.</p> <p>6 And then the plaintiffs' motion about</p> <p>7 experts, which the defendants have responded</p> <p>8 to. So I'm assuming we can hear that one, the</p> <p>9 one about the experts today, everybody is ready</p> <p>10 on that one.</p> <p>11 (Attorney Singer nods head.)</p> <p>12 THE COURT: Okay. And then the invention</p> <p>13 date, that was your motion, so are -- is it</p> <p>14 productive to have a discussion about that one</p> <p>15 today or do we need to put that one off till</p> <p>16 Monday morning when trial starts?</p> <p>17 MR. SINGER: We'd ask you to put it off,</p> <p>18 Your Honor, so that we can respond to that.</p> <p>19 THE COURT: All right.</p> <p>20 MR. SINGER: But we're happy to address it</p> <p>21 sooner than the morning of trial, if that works</p> <p>22 for the Court.</p> <p>23 THE COURT: Well, I don't know. I've only</p> <p>24 read one side. Okay. So the only thing we</p> <p>25 have left is this one Motion in Limine. And</p>

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<p style="text-align: right;">Page 50</p> <p>1 then what's your discovery issue?</p> <p>2 MR. SINGER: It's very straightforward,</p> <p>3 Your Honor. I can address it very quickly. As</p> <p>4 the Court knows from the prior hearings, this</p> <p>5 is a case about the defendants' ANDA file, the</p> <p>6 FDA and ANDA.</p> <p>7 And the interesting thing about the ANDA</p> <p>8 process is it's an ongoing process. So the</p> <p>9 defendants' file on ANDA and then the FDA</p> <p>10 reviews the ANDA and issues sort of</p> <p>11 correspondence -- not sort of issues</p> <p>12 correspondence to the defendants asking them</p> <p>13 for further information, giving them guidance,</p> <p>14 saying certain things about the ANDA.</p> <p>15 And so the whole package of what the ANDA</p> <p>16 is, is the application, then plus the</p> <p>17 correspondence and then any responses to the</p> <p>18 correspondence from the defendants.</p> <p>19 In preparing for trial we asked all the</p> <p>20 defendants to say okay, this is an ongoing</p> <p>21 process, can you please supplement your</p> <p>22 productions to give us whatever additional FDA</p> <p>23 back and forth there has been under ANDA for</p> <p>24 the last ten months or so.</p> <p>25 And defendants Sandoz and Hi-Tech promptly</p>	<p style="text-align: right;">Page 52</p> <p>1 correspondence in the last ten months which, in</p> <p>2 my experience, is unlikely that there isn't any</p> <p>3 correspondence from the FDA, we ask that it be</p> <p>4 produced. That's pretty straightforward.</p> <p>5 THE COURT: For Apotex.</p> <p>6 MR. ALUL: At the outset I would like to</p> <p>7 characterize how FDA correspondence regarding</p> <p>8 ANDA is viewed. The ANDA is the submission</p> <p>9 that's made by the drug company initially.</p> <p>10 Further correspondence between FDA and the</p> <p>11 applicant on that is exactly that, the further</p> <p>12 correspondence between the applicant and the</p> <p>13 FDA. They did approach us several weeks ago</p> <p>14 and asked us if there were any recent ANDA</p> <p>15 correspondence.</p> <p>16 We did our due diligence and spoke with</p> <p>17 our client, and there were no responsive or</p> <p>18 relevant documents to this case, Your Honor.</p> <p>19 That answer was not good enough for them.</p> <p>20 They came back and said, as Mr. Singer</p> <p>21 just explained, that they want to know if there</p> <p>22 are any FDA correspondence between Apotex and</p> <p>23 the FDA concerning the ANDA.</p> <p>24 And our position is pretty simple, Your</p> <p>25 Honor. What they're trying to do is discover</p>
<p style="text-align: right;">Page 51</p> <p>1 provided the information. Defendant Apotex</p> <p>2 gave us a response that said I think he can</p> <p>3 speak for himself, that said there's no</p> <p>4 responsive and relevant correspondence. We</p> <p>5 tried to confirm, does that mean is there no</p> <p>6 correspondence or is it you don't think it's</p> <p>7 relevant.</p> <p>8 We never got a response. The last letter</p> <p>9 we got, or the last information that we got</p> <p>10 from Apotex about this FDA exchange is from</p> <p>11 December of 2011. So we're ten months since</p> <p>12 then. They produced it before.</p> <p>13 They won't tell us there's none since and</p> <p>14 it's relevant to the case. We're being asked</p> <p>15 to put forward our burden on infringement. We</p> <p>16 don't know what's in that correspondence and</p> <p>17 what's in their responses.</p> <p>18 And if you look at the authorities, that's</p> <p>19 the package the Court is considering in this</p> <p>20 case is the actual addition -- initial</p> <p>21 application, then the FDA's letters and the</p> <p>22 defendants' response thereto.</p> <p>23 This is pretty simple stuff. The other</p> <p>24 defendants have produced and all we've been</p> <p>25 told is there is no responsive and relevant</p>	<p style="text-align: right;">Page 53</p> <p>1 whether or not there exists any relevant or</p> <p>2 responsive information here with respect to</p> <p>3 this and with respect to -- and our position is</p> <p>4 that in itself is nondiscoverable.</p> <p>5 But, Your Honor, what we haven't heard</p> <p>6 from -- what we have just heard from Mr. Singer</p> <p>7 was this categorical assertion that this</p> <p>8 conclusory assertion that this stuff is</p> <p>9 relevant.</p> <p>10 In fact, Your Honor, they haven't told us</p> <p>11 why it's relevant. This is a very simple,</p> <p>12 narrow case asserting method claims from two</p> <p>13 patents and the validity of those patents.</p> <p>14 What they haven't explained to us is how</p> <p>15 any recent correspondence between us and FDA</p> <p>16 concerning the ANDA could bear on infringement</p> <p>17 or invalidity, which are the only two issues in</p> <p>18 this case.</p> <p>19 What we suspect that they're trying to do,</p> <p>20 Your Honor, is get their hands on this</p> <p>21 correspondence and try to gauge where we are in</p> <p>22 the regulatory approval process.</p> <p>23 Which would unfairly bestow on them, Your</p> <p>24 Honor, a competitive business advantage against</p> <p>25 us. And that's why we strenuously object to</p>

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<p style="text-align: right;">Page 54</p> <p>1 this. We have assured them that there are no 2 FDA correspondence that concern any aspect of 3 the infringement case or any aspect of the 4 invalidity case. 5 And that's all they deserve under Rule 26. 6 And so that's our position, Your Honor. 7 THE COURT: Okay. 8 MR. SINGER: May I briefly respond, Your 9 Honor? 10 THE COURT: All right. 11 MR. SINGER: Well, it's an assurance that 12 there's no relevant -- I have no idea what the 13 basis of that assurance is. Typically, in an 14 ANDA case the FDA makes comments on the 15 information in the ANDA and whether or not it's 16 relevant to infringement. 17 It has to be remained to be seen. As far 18 as validity, sometimes the FDA makes comments 19 that can be relevant to the validity of the 20 patent based on the technology that's in the 21 ANDA. 22 Without having seen the correspondence, I 23 can only deal in hypotheticals. As to 24 typically FDA correspondence does come into 25 evidence in an ANDA case. So I don't see why</p>	<p style="text-align: right;">Page 56</p> <p>1 You know what, in the 12 years that I've 2 been doing this I have not seen -- I can't 3 recall seeing any FDA correspondence that 4 touches on the validity of a patent that the 5 brand owner has. 6 So that I disagree with Mr. Singer on. 7 Certainly, there may be some FDA communications 8 that touch on infringement, but this is a very 9 narrow infringement case involving method 10 claims only. 11 So if Mr. Singer could provide us with 12 some guidance as to what he's looking for here, 13 we could help him out. Is he concerned about 14 any changes we've made to our labeling? I can 15 tell him categorically there have been none. 16 THE COURT: Well, you know, you all 17 certainly can discuss it and if there are 18 competitive concerns then, you know, I don't 19 know what your protective order says, I didn't 20 go look at it to see if there was any counsel 21 eyes only designation provisions in there but, 22 you know, you might solve it that way as well. 23 I certainly -- I'm happy for you not to 24 file the motion and for you all to resolve it 25 and would encourage you to talk about it. But</p>
<p style="text-align: right;">Page 55</p> <p>1 it's any different here. 2 THE COURT: Okay. I don't actually know 3 anything about this. You all are appreciative 4 of this. I mean, I know a little bit about it, 5 but everything I know you all have told me 6 before. 7 So this sounds like a Motion to Compel to 8 me; right? 9 MR. SINGER: If that's how the Court wants 10 us to proceed, that's how we will proceed. 11 THE COURT: So you file your Motion to 12 Compel by Monday and you file your response by 13 next Friday and you file your reply by the next 14 Monday, and I'll rule on it. 15 MR. SINGER: Very well. Thank you, Your 16 Honor. 17 THE COURT: And that way you can put it 18 before me and I'll have time to think about it 19 in some context and I can hopefully get you a 20 decision before trial starts. 21 MR. ALUL: I would just say one last 22 thing, Your Honor, and maybe we can short 23 circuit this briefing process if Mr. Singer and 24 the plaintiffs could just identify for us what 25 it is they're looking for.</p>	<p style="text-align: right;">Page 57</p> <p>1 I don't know enough to give you any guidance at 2 this point. So, sorry. 3 MR. SINGER: We will try to resolve it, 4 Your Honor. 5 THE COURT: But if you don't, you know -- 6 and you don't have to write me a long book 7 about it in terms of the brief, but you all 8 have laid out your arguments. 9 You know, tell me you kind of know what 10 the other person is going to say, so tell me 11 what I need to know and I'll get you -- I'm 12 pretty fast, usually. 13 So I'll -- I do have some other stuff 14 going on the week of the 22nd, but I'll get 15 you -- I might not get you an opinion, but I'll 16 get you a decision, which is usually good 17 enough. 18 MR. ALUL: Thank you, Your Honor. 19 MR. SINGER: Thank you. 20 THE COURT: Pretty fast if you're not able 21 to work it out. But, you know, I would 22 encourage you while you're here to look at each 23 other and try to work it out so that maybe -- 24 sometimes that's helpful. All right. 25 What else besides the Motion in Limine?</p>

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<p style="text-align: right;">Page 58</p> <p>1 MR. SINGER: I think that's it.</p> <p>2 THE COURT: Nothing else. Down to the</p> <p>3 Motion in Limine. Okay. Then that is the</p> <p>4 plaintiffs' motion, and I'll be glad to hear</p> <p>5 from you.</p> <p>6 MR. SINGER: Okay. So, Your Honor, as you</p> <p>7 said, this is our Motion in Limine and what it</p> <p>8 concerns is the defenses of anticipation and</p> <p>9 obviousness raised by the defendants through</p> <p>10 two of their experts, Dr. Sherman and</p> <p>11 Leibowitz.</p> <p>12 And just as some background, those</p> <p>13 defenses are validity defenses to the patent</p> <p>14 and the way they differ, anticipation rises</p> <p>15 under Section 102 of the Patent Act 35 U.S.C.</p> <p>16 102.</p> <p>17 And what they're required to prove is also</p> <p>18 clear and convincing evidence that one single</p> <p>19 prior reference, when we use the word</p> <p>20 anticipates, the patents, and that means that</p> <p>21 that single prior reference, without looking to</p> <p>22 anything else, has all the elements of the</p> <p>23 patent claim.</p> <p>24 And that's a good way to think about the</p> <p>25 difference between obviousness, where the</p>	<p style="text-align: right;">Page 60</p> <p>1 in the points of agreement as well. In</p> <p>2 discovery defendants literally identified</p> <p>3 hundreds of references that they contend relate</p> <p>4 to their proof of validity.</p> <p>5 And they actually filed with the Court on</p> <p>6 Friday their so-called 282 statement which</p> <p>7 lists 518 pieces of either prior or other</p> <p>8 references that they contend they will use to</p> <p>9 support their validity arguments.</p> <p>10 A lot of stuff, hence, the length of the</p> <p>11 parties' exhibit lists. And the expert</p> <p>12 discovery process is hopefully to narrow those</p> <p>13 down. And they have. They've narrowed it down</p> <p>14 somewhat.</p> <p>15 And I want to start with Dr. Sherman's</p> <p>16 report and the issue of obviousness because on</p> <p>17 anticipation I think the response we're in</p> <p>18 agreement with where the -- I think both</p> <p>19 parties said the same thing about anticipation.</p> <p>20 They made some comment that something else</p> <p>21 might come up at trial. We'll handle that at</p> <p>22 trial. If something else comes up that we</p> <p>23 think is improper, we'll raise an objection</p> <p>24 right there.</p> <p>25 But it seems like the parties are</p>
<p style="text-align: right;">Page 59</p> <p>1 single prior reference doesn't have all the</p> <p>2 elements of the patent claim and you have to</p> <p>3 combine whatever prior reference you're talking</p> <p>4 about with something else.</p> <p>5 So I think it's an easy way to think about</p> <p>6 it. Anticipation is one reference and</p> <p>7 obviousness is one or more. And obviousness</p> <p>8 can be combined with multiple references, you</p> <p>9 might say, or they will say that our patents</p> <p>10 are invalid based on references A considered in</p> <p>11 light of B, something like that.</p> <p>12 And for anticipation they're required to</p> <p>13 prove that's anticipated by reference A only.</p> <p>14 They don't get to look at B. So that's sort of</p> <p>15 the background, and these are the opinions we</p> <p>16 have a dispute about.</p> <p>17 We've made a little bit of progress,</p> <p>18 actually. In their response to the Motion in</p> <p>19 Limine I think the zone of disagreement has</p> <p>20 narrowed, which is good.</p> <p>21 And I think the response was hopeful to us</p> <p>22 to understand where they're coming from. So</p> <p>23 there's really just two points of disagreement</p> <p>24 left.</p> <p>25 Let me address those, and then I'll weave</p>	<p style="text-align: right;">Page 61</p> <p>1 otherwise on the same page, on the anticipation</p> <p>2 side of Dr. Sherman's opinion. So where there</p> <p>3 is disagreement is on the obviousness side.</p> <p>4 That's where you combined A plus B, and if you</p> <p>5 want, C plus D, et cetera.</p> <p>6 And in our motion listed the specific</p> <p>7 combination, the specifics A plus B that Dr.</p> <p>8 Sherman had made in his report.</p> <p>9 And I didn't see defendants say that that</p> <p>10 was an erroneous list. What they said in</p> <p>11 response, though, was that Dr. Sherman had</p> <p>12 discussed other references elsewhere in his</p> <p>13 report and that by saying and reserving the</p> <p>14 right to rely on those other references, that</p> <p>15 that was a sufficient disclosure of a</p> <p>16 combination to us.</p> <p>17 And therefore, they should be allowed to</p> <p>18 raise any combination of any reference that's</p> <p>19 in his report for obviousness, whether or not</p> <p>20 he specifically mentioned it or not.</p> <p>21 And I think there are roughly three dozen</p> <p>22 references in his report, Your Honor. And I'm</p> <p>23 not going to do the math, but the possible</p> <p>24 combinations are in the hundreds, if not</p> <p>25 thousands, of the way one could combine those</p>



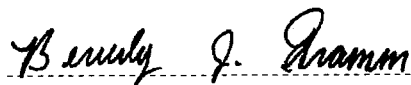
<p style="text-align: right;">Page 62</p> <p>1 various references.</p> <p>2 And so we think that under Rule</p> <p>3 26(A)(3)(B), which is the rule requiring the</p> <p>4 bases and facts of your opinion, just simply</p> <p>5 referring to I've raised other references</p> <p>6 elsewhere in my report, that I think also</p> <p>7 support the obvious.</p> <p>8 The patent is not sufficient and unfair.</p> <p>9 And we don't have from Dr. Sherman, if you</p> <p>10 will, anything beyond the specific combinations</p> <p>11 that he raised.</p> <p>12 And to ask us to figure out and to say</p> <p>13 it's fair notice, which is I think their</p> <p>14 argument, that any reference in his report,</p> <p>15 because he said, and by the way, I think it's</p> <p>16 all true about these other references is</p> <p>17 sufficient disclosure, we think violates both</p> <p>18 the letter and spirit of Rule 26.</p> <p>19 With respect to Dr. Leibowitz, it's</p> <p>20 actually, I think, the reverse. In responding</p> <p>21 they said his obvious opinion. In our Motion</p> <p>22 in Limine, at his deposition Dr. Leibowitz was</p> <p>23 less than, how shall I say, is less than</p> <p>24 fulsome about the bases of his obviousness</p> <p>25 opinion.</p>	<p style="text-align: right;">Page 64</p> <p>1 think the disclosure in Dr. Sherman's</p> <p>2 obviousness section is woefully inadequate for</p> <p>3 him to then come to trial and essentially, Your</p> <p>4 Honor, say I'm going to pick this reference</p> <p>5 from page 8 of my report and combine it with</p> <p>6 this reference on page 40 of my report and</p> <p>7 render the patent's obviousness because he</p> <p>8 didn't make that specific combination in the</p> <p>9 report.</p> <p>10 And then for Dr. Leibowitz we are arguing</p> <p>11 over the Woodward reference that they referred</p> <p>12 to in footnote 33 at page 18 of his report. We</p> <p>13 don't think that a, as I said, see also is a</p> <p>14 disclosure under Rule 26 of an expert opinion</p> <p>15 on validity where someone has to establish by</p> <p>16 clear and convincing evidence that each of the</p> <p>17 elements of the claim are met.</p> <p>18 I'm happy to answer any questions the</p> <p>19 Court has about this.</p> <p>20 THE COURT: All right. Thank you for the</p> <p>21 defendants.</p> <p>22 MR. HELMS: Brandon Helms on behalf of</p> <p>23 Sandoz. And if it's okay with you, I will</p> <p>24 address Dr. Sherman's portion and my co-counsel</p> <p>25 will address Dr. Leibowitz.</p>
<p style="text-align: right;">Page 63</p> <p>1 But with the response from defendants in</p> <p>2 their motion response, I again think we are on</p> <p>3 the same page as to what Dr. Leibowitz is going</p> <p>4 to argue at trial.</p> <p>5 Again, if there's an issue we'll raise it</p> <p>6 on the spot. The only point of disagreement</p> <p>7 that we have with Dr. Leibowitz now is on the</p> <p>8 anticipation side. And that's, again, that's</p> <p>9 where one reference has to have everything.</p> <p>10 And we listed in our motion the references</p> <p>11 that we understood Dr. Leibowitz to rely on,</p> <p>12 and defendants agreed with that, but then added</p> <p>13 one additional reference, that they said he</p> <p>14 referred to in a footnote on page 18 of his</p> <p>15 report, it was essentially a see also, and then</p> <p>16 citing the reference.</p> <p>17 There's no page citation, there's no</p> <p>18 discussion of that reference in his report.</p> <p>19 And so, again, we don't think it's proper to</p> <p>20 say that you've disclosed an opinion based on a</p> <p>21 footnote that says see also this reference,</p> <p>22 where the reference is not otherwise disclosed</p> <p>23 or discussed in this report.</p> <p>24 That's really where we are, Your Honor.</p> <p>25 Like I said, we've made some progress. We</p>	<p style="text-align: right;">Page 65</p> <p>1 THE COURT: All right.</p> <p>2 MR. HELMS: The problem with plaintiffs'</p> <p>3 motion is it seeks to explicitly set forth in</p> <p>4 the report inherent anticipation. I don't</p> <p>5 think we're far off.</p> <p>6 We agree with the characterization that</p> <p>7 there are three primary references for the 404</p> <p>8 patent, three primary references for the 029</p> <p>9 patent for Dr. Sherman's, the only concern we</p> <p>10 have on anticipation is there's also inherent</p> <p>11 anticipation.</p> <p>12 THE COURT: There is what?</p> <p>13 MR. HELMS: Inherent anticipation.</p> <p>14 THE COURT: Okay.</p> <p>15 MR. HELMS: And under that doctrine the</p> <p>16 reference discloses all of the elements. But</p> <p>17 some of them are inherent, and so that's</p> <p>18 inherent in that reference you can use other</p> <p>19 evidence to show that.</p> <p>20 And so that's not clear in their motion</p> <p>21 whether they aren't seeking to preclude us from</p> <p>22 relying on those references that underlie his</p> <p>23 opinion. And so I still don't know what this</p> <p>24 is -- that is.</p> <p>25 So to the extent they're trying to</p>

<p style="text-align: right;">Page 66</p> <p>1 preclude him from relying on references that 2 support or bolster his anticipation arguments, 3 we would oppose that because it's explicitly 4 set forth in his report. 5 As to obviousness, Dr. Sherman's report 6 was 80 pages. He has 21 pages on obviousness 7 and in which he discussed comprehensively a 8 number of prior references. 9 And they're seeking to limit him to seven 10 prior art references and eight combinations 11 from a section of his report that was titled 12 Representative Combinations. 13 And so the problem with that is they know 14 what he's going to be saying on these 15 references, they know exactly what Dr. 16 Sherman's opinions are and they had a chance to 17 depose him and ask him about them. 18 So there is no surprise at trial, there is 19 no possible prejudice. You know, we've given 20 them some main combinations that he may rely 21 upon, but to the extent they're trying to 22 exclude him from arguing about other opinions, 23 other references in his report, there's no 24 rational bases for that. 25 And in fact, the case law that they cited</p>	<p style="text-align: right;">Page 68</p> <p>1 talking a little fast and I just missed the 2 last thing you said. 3 MR. HELMS: I'll go back a little. 4 THE COURT: Back up a little bit. 5 MR. HELMS: Sure. There was another thing 6 that besides putting forth explicit 7 combinations, KSR requires the Court to 8 consider the knowledge of skill in the art at 9 the time. 10 And to do that Dr. Sherman needs to 11 discuss other prior art references. And to the 12 extent that their motion is seeking to preclude 13 him from discussing those references and 14 showing what the level of skill in the art at 15 the time, it's improper. 16 There has not been any Rule 26 violation 17 here. We've given them comprehensive reports. 18 They know what our arguments are going to be. 19 They know what Dr. Sherman's thoughts are on 20 all these prior art references. 21 So there doesn't seem to be a reason to 22 grant their motion. That's what I have to say 23 about Dr. Sherman. 24 MR. ALUL: Andy Alul on behalf of Apotex. 25 I'm going to address the plaintiffs' motion</p>
<p style="text-align: right;">Page 67</p> <p>1 in the report doesn't support them. They cited 2 two main cases Carr versus Dee and Whit versus 3 Chesapeake. 4 In the Carr versus Dee case, the plaintiff 5 didn't provide Rule 26 disclosures of the 6 expert qualifications. They served the expert 7 report four months late, and the defendant 8 never had a chance to depose the expert. And 9 as I mentioned, that is not the case here. 10 The other case, Whit versus Chesapeake, 11 the plaintiff wanted another expert to opine on 12 650 references that were not disclosed in the 13 report. Again, that isn't the case here. 14 We do not intend for Dr. Sherman to opine 15 on any reference that was not disclosed in his 16 report. What plaintiffs are trying to do is 17 preclude him from making those arguments. 18 And one final point is that in an 19 obviousness case the -- besides explicit prior 20 art references, the Court, under KSR, may 21 consider the knowledge of skill in the art 22 on -- of a person. 23 THE COURT: Of a person what? 24 MR. HELMS: I'm sorry? 25 THE COURT: I just missed -- you were</p>	<p style="text-align: right;">Page 69</p> <p>1 dealing with Dr. Leibowitz. 2 Before I do that I would just ask the 3 Court to indulge me for a few seconds to 4 respond to Mr. Singer's comments on -- general 5 comments on obviousness and prior art of the 6 282 statement. 7 I generally don't have an objection with 8 Mr. Singer's description of anticipation and 9 obviousness. What I do object to strenuously 10 though is his suggestion that be somehow, 11 because we disclosed in our Interrogatory 12 responses or our section at 282 statement which 13 was served and not filed, that's probably why 14 you don't see it on the docket, that because we 15 disclosed hundreds of prior references there 16 and in our expert reports, we only focused on a 17 few, that somehow we, as parties, are precluded 18 from ever relying on those other references. 19 There was actually a recent Federal 20 Circuit case on this that's pretty much 21 directly on point, that says if your experts 22 come out and discuss certain references, sure, 23 they're limited to those. 24 But if the party discloses and relies on 25 more references in its Interrogatory responses</p>

<p style="text-align: right;">Page 70</p> <p>1 and 282 notice, then the party, through trial 2 post -- pre- or post-trial briefing, or even 3 through fact witnesses, can also rely on those 4 other prior art representations to support 5 their invalidity case. 6 And so I just -- I guess what I'm just 7 trying to say, in summary here, is that we have 8 a general agreement with Mr. Singer and 9 plaintiffs that yes, the experts are sort of 10 limited to a universe of what they discuss and 11 properly disclosed in their reports. 12 But this doesn't mean that, as parties, 13 Apotex, Sandoz, and Hi-Tech were precluded from 14 relying on many of these other prior 15 references. 16 Through attorney argument, our pre- or 17 post-trial briefs, or even through fact 18 witnesses, just hypothetically speaking, from 19 relying on those to support our case. And 20 that's the argument we'd like to make there. 21 Regarding Dr. Leibowitz, we appreciate it 22 appears we've mooted an issue in their motion 23 with respect to his obviousness opinions. And 24 the only thing that I would say, Your Honor, 25 just to respond directly to their criticism of</p>	<p style="text-align: right;">Page 72</p> <p>1 The implication being this reference also does 2 the same thing here. So how they can feign 3 surprise over this one reference is beyond me. 4 Because his opinions with respect to 5 anticipation are really simple. These 6 references, each of them disclose using 7 Bimatoprost on the eye for hair growth. This 8 reference is only eight pages. This reference 9 they're complaining about is only eight pages 10 long. 11 And if they look at it, I'm sure they'll 12 see that it discloses the exact same thing, and 13 that's what his opinion is. So, Your Honor, 14 he's satisfied his under -- obligations under 15 Rule 26(A)(2). 16 We know of no duty on behalf of an expert 17 under Rule 26(A)(2) to not only discuss or 18 identify a reference, but also discuss it in 19 detail. 20 And there isn't a -- there is a minimum 21 sentence amount or something like that here. 22 He explained his anticipation thoroughly. He 23 talks about the references that support it and 24 he talks about an additional one in a footnote, 25 he says see this also.</p>
<p style="text-align: right;">Page 71</p> <p>1 Dr. Leibowitz in his deposition testimony was 2 when they started asking about his obviousness 3 opinions at the end of a full seven-hour 4 deposition he was exhausted and they tried to 5 turn it into a memory game. 6 He did the best that he could. The report 7 was in front of them and just by virtue of the 8 fact that they've agreed that his obviousness 9 opinions are adequately disclosed in his expert 10 report, this is a nonissue now. 11 On the anticipation issue, Your Honor, 12 this -- he's got three pages in his report, 13 starting at page 15 through 18, where he 14 discusses in detail, he doesn't just identify 15 them, he discusses in detail five references 16 that disclose that each -- that in his opinion 17 each disclosed every element of claim 14 of the 18 404 patent. 19 And his anticipation argument, Your Honor, 20 is simple. There's a common thread for each 21 reference. It's -- each reference discloses 22 the use of the Bimatoprost on the eyelid for 23 eyelash growth. Very simple. 24 And then he does drop a footnote at the 25 end of that discussion that says see also this.</p>	<p style="text-align: right;">Page 73</p> <p>1 The implication being my opinion applies 2 to this reference as well. That's that. 3 THE COURT: Okay. 4 MR. ALJUL: Thank you, Your Honor. 5 THE COURT: Thank you. Rebuttal? 6 MR. SINGER: Let me pick up where counsel 7 left off with the Leibowitz, the reference. 8 I've read the reference that they -- the see 9 also, and that's why we're here complaining 10 about it. 11 It doesn't talk about the Bimatoprost and 12 eyelash growth. It talks about -- 13 THE COURT: I'm sorry? 14 MR. SINGER: It doesn't talk about eyelash 15 growth, that's the issue. He goes through and, 16 as you would expect, I mean it's a clear and 17 convincing evidentiary burden. 18 Dr. Leibowitz goes through the opinions he 19 has on the five references he discusses in 20 detail. And then he says see also, and he 21 identifies a publication and he point -- Your 22 Honor, he points to in each of those five 23 references where we can find what he's relying 24 on. 25 So we don't have to hunt and peck and find</p>

<p style="text-align: right;">Page 74</p> <p>1 in an article what pages or information he's 2 relying on.</p> <p>3 In the see also Woodward reference, it's 4 eight pages, as counsel said. It doesn't tell 5 us where in there to look. Maybe there is 6 something there that we've missed that he's 7 relying on and it's not there, as far as we can 8 tell.</p> <p>9 And again, the reason we have Rule 26 is 10 that for an expert to say the facts and bases 11 of his opinion. Not just to conclusory say 12 that this reference anticipates. That's 13 essentially what he does.</p> <p>14 I hear you. The implication is that it 15 says the same thing as these other references. 16 But when I read it, I don't see that 17 information. So we're left to guess as to what 18 Dr. Leibowitz's opinion is.</p> <p>19 With respect to -- so that's really my 20 response on Dr. Leibowitz. It doesn't make any 21 sense to us. That's why we're here complaining 22 about it. If it was exactly the same as these 23 other references, I think we could live with 24 it.</p> <p>25 With respect to Dr. Sherman, what I heard</p>	<p style="text-align: right;">Page 76</p> <p>1 be combined to allegedly render the patent 2 valid.</p> <p>3 That's really it. Just a little fairness 4 on what we're going to have at trial.</p> <p>5 Otherwise, we're going to have a very, very 6 lengthy cross-examination of Dr. Sherman. And 7 on direct we're going to have him point, it's 8 going to be a very inefficient process with Dr. 9 Sherman on the stand if this goes forward this 10 way.</p> <p>11 MR. HELMS: Your Honor, may I briefly 12 respond to that point?</p> <p>13 THE COURT: Okay.</p> <p>14 MR. HELMS: Counsel says it is unfair to 15 discuss these references and then combine them 16 at trial, but they haven't pointed to any case 17 law indicating that it's unfair.</p> <p>18 They haven't shown us Rule 26 requires us 19 to put every single combination together. And 20 like he said, that might have taken 2,000 pages 21 if we wanted to go through every single detail 22 what he's talking about, which would have also 23 been unfeasible.</p> <p>24 We don't think this will be an issue that 25 comes up at trial. If they think that at trial</p>
<p style="text-align: right;">Page 75</p> <p>1 is that it's okay in an expert report to 2 disclose representative opinions and that we 3 are supposed to figure out from all the other 4 references disclosed what combinations of 5 references Dr. Sherman is going to present at 6 trial.</p> <p>7 That's just not fair. And the notion that 8 at a deposition we could inquire as to every 9 single combination is, in a word, unfeasible. 10 As I said, there are hundreds -- I think we did 11 the math, there are actually thousands of 12 combinations based on the categories he 13 described to these references.</p> <p>14 And we would have been at his deposition 15 for days trying to get him through every single 16 combination that was possible. So we think the 17 Court should limit him to the combinations he's 18 actually identified in his expert report.</p> <p>19 We are not trying to bar him from talking 20 about references that he's actually disclosed. 21 We're simply saying that you can't pick a 22 reference you disclosed on page 10, combine it 23 with a reference you've disclosed on page 40, 24 simply because you reserve the right to do so, 25 without explaining how those two things should</p>	<p style="text-align: right;">Page 77</p> <p>1 we're letting a combination that they didn't 2 have any knowledge about that, that would be 3 the appropriate time to address this.</p> <p>4 But as it stands right now, they have all 5 of our information, they can't possibly be 6 surprised if he just -- if he talks about 7 references that he's comprehensively discussed 8 in his report. And it should be left at that. 9 Thank you, Your Honor.</p> <p>10 THE COURT: Okay.</p> <p>11 MR. ALUL: Your Honor, just one last word 12 on Dr. Leibowitz. And I'll be brief. So it's 13 not my understanding of plaintiffs' sole 14 complaint with respect to the see Woodward 15 reference at the end of Dr. Leibowitz's 16 anticipation discussion that well, we looked at 17 the reference and we don't see anything about 18 Bimatoprost growing eyelashes. We see 19 Bimatoprost, but it doesn't grow eyelashes.</p> <p>20 Your Honor, we submit that's something 21 more appropriate for cross-examination. And in 22 fact, it's my recollection that they never even 23 asked Dr. Leibowitz about this in his 24 deposition.</p> <p>25 If they were so concerned about this</p>

<p style="text-align: right;">Page 78</p> <p>1 reference and its implications to the validity 2 of their patent, why didn't they even ask him 3 about it at his deposition? And the concerns 4 they have could be raised and dealt with in 5 three or four minutes on cross-examination at 6 trial.</p> <p>7 That shouldn't warrant -- their criticism 8 shouldn't warrant entirely not allowing him to 9 opine on their reference whatsoever when this 10 is disclosed in here.</p> <p>11 They can see it's in the footnote. They 12 can see he's adequately discussed his 13 anticipation opinions with respect to five 14 other references.</p> <p>15 Their sole complaint is we don't think it 16 really supports his opinion. That's a 17 cross-examination issue. Thank you, Your 18 Honor.</p> <p>19 MR. SINGER: May I make one last point, 20 Your Honor?</p> <p>21 THE COURT: You may.</p> <p>22 MR. SINGER: That's not a 23 cross-examination issue because we don't know 24 what to cross-examine him on. What you will 25 see, Your Honor, at trial is the parties will</p>	<p style="text-align: right;">Page 80</p> <p>1 said.</p> <p>2 THE COURT: As you said, that's key for 3 I'm starting to repeat myself.</p> <p>4 MR. SINGER: I will sit down. That's 5 enough, Your Honor.</p> <p>6 THE COURT: All right. Thank you. All 7 right. Well, it seems to me that I can deal 8 with the evidence issues raised here better at 9 trial. So when I have a little bit more 10 context for these issues.</p> <p>11 And it also seems possible that they won't 12 even come up. So being a fan generally of not 13 deciding things that I don't have to, I am 14 going to deny the Motions in Limine.</p> <p>15 But that doesn't mean you shouldn't raise 16 your objections during these experts' testimony 17 if they in fact start testifying about things 18 that you think were not adequately disclosed.</p> <p>19 Okay. So it's denied to the extent you 20 want a pretrial ruling on it, and that's 21 without prejudice to raise it at trial when the 22 witnesses actually testify.</p> <p>23 Okay. Can we do anything else 24 productively today? 25 (No response.)</p>
<p style="text-align: right;">Page 79</p> <p>1 put up a lot of prior art references. And 2 defendants and plaintiffs will do them for 3 their own particular purposes, either to 4 explain the technology or, in defendants' case, 5 try to render the patents invalid.</p> <p>6 You will see they will focus on certain 7 portions of them, as is natural. The Court 8 construed the claims, the Court focused on 9 certain portions of what had lengthy -- as to 10 the claims.</p> <p>11 The parties will do the same thing in 12 trying to teach the Court about these prior art 13 references. They will say look at page 300, 14 lines 1 to 30. And that's the key part of this 15 reference, that according to them, will render 16 the patent invalid.</p> <p>17 Dr. Leibowitz does that for those other 18 five references. He explains to us, so we 19 could examine him at his deposition, what he's 20 relying on.</p> <p>21 A citation says see also an article is 22 not -- that's not disclosing the facts and 23 bases of an opinion under Rule 26 for purposes 24 of rendering a patent invalid. It just isn't. 25 We don't know what he's going to rely on, as I</p>	<p style="text-align: right;">Page 81</p> <p>1 THE COURT: No? All right. Everybody's 2 moving out of discovery mode and into trial 3 mode. Okay. Good. I'm getting a few nods.</p> <p>4 All right. I can do a scheduling order 5 covering the matters that we worked out at the 6 beginning part of the hearing if you all want 7 me to.</p> <p>8 That would be helpful? Okay. I will. 9 I'm getting some nods yes. It shouldn't be 10 very long. And if I forget to put anything in 11 there, whatever we said here in court still 12 goes.</p> <p>13 That's just my forgetting to write 14 something down. We all have a little bit of 15 help on that. Okay. All right. Well, I'm 16 sure we're going to have an interesting 17 experience together.</p> <p>18 I appreciate you all's preparation on 19 this. And you all have been very clear so far 20 in helping me understand this, so I won't say 21 I'm looking forward to it, but I'm sure -- I 22 actually have an interest -- I'm interested in 23 a lot of things and I'm sure you all are going 24 to make many parts of this interesting. 25 So I know not everything can be</p>

<p style="text-align: right;">Page 82</p> <p>1 interesting, so I'm not going to hold you to 2 that standard. All right. So I will see you 3 back here in what, one, two, three and a half 4 weeks, roughly. All right. 5 And if you do settle it, which I'm not 6 expecting, but particularly because I'm not 7 expecting it, if you do settle it let me know 8 immediately so I can stop working on it. 9 But otherwise, I'll just see you here on 10 November 5th and look for all of your trial 11 briefs and such when they become due. Yes, 12 sir. 13 MR. McDEVITT: Your Honor, if the parties 14 have matters that need the Court's attention 15 before trial starts, how would you like for us 16 to let you know about that? 17 THE COURT: Well, you know, you can get on 18 the phone with the clerk together, or I mean, 19 one of you from each side and tell her what it 20 is. Possibly we can do it -- that's the 21 easiest way. 22 Especially if it's something logistical, 23 she probably actually can answer it without me. 24 But if you really have something come up, you 25 can call her, talk to Miss Sanders, you can --</p> <p style="text-align: right;">Page 83</p> <p>1 it's easiest if you -- you can send her an 2 e-mail if she's receiving those. 3 MR. McDEVITT: It's all right if we 4 communicate directly with the clerk about 5 matters? 6 THE COURT: You can communicate with the 7 clerk. Not trying to argue the merits or 8 anything to her, but you can communicate with 9 her about the best way to communicate with me. 10 Because I appreciate not everything requires a 11 motion and a brief and 21 days to respond. 12 We don't really have that much time. I 13 hope you won't need me, but we can always have 14 a telephone conference if -- with limited 15 participants. I find those difficult with a 16 lot of people. But if we have to. 17 But I will say, I have -- I'm going to be 18 in Richmond the week of October 22nd with the 19 Fourth Circuit and not really available, and I 20 have a bunch of criminal sentencings before, a 21 week before this trial starts, and so I have 22 time to work on this and will be working on it. 23 But I don't have a lot of flexibility 24 about it because of my other court obligations, 25 so I hope you don't need me. But if you come</p>	<p style="text-align: right;">Page 84</p> <p>1 talk to Miss Sanders and she'll -- we'll figure 2 out the best way to deal with it, depending on 3 the nature of the problem. 4 MR. McDEVITT: Thank you, Your Honor. 5 THE COURT: All right. Anything else? 6 And, Mr. Fox, you can tell Miss Broom that you 7 got an A. 8 MR. FOX: Thank you, Your Honor. I 9 appreciate that. 10 THE COURT: All right. We're adjourned. 11 (Hearing concluded at 11:05 a.m.) 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 85</p> <p>1 STATE OF NORTH CAROLINA 2 COUNTY OF GUILFORD 3 4 REPORTER'S CERTIFICATE 5 6 I, Beverly J. Gramm, Registered 7 Professional Reporter, certify that the foregoing 8 proceedings were taken before me at the time and 9 place therein set forth; 10 11 That all objections and statements made at 12 the time of the proceedings were recorded 13 stenographically by me and were thereafter 14 transcribed; 15 16 That the foregoing is a true and correct 17 transcript of my shorthand notes taken. I further 18 certify that I am not a relative or employee of any 19 attorney or the parties, nor financially interested 20 in the action. 21 22 I declare under penalty of perjury under 23 the laws of North Carolina that the foregoing is 24 true and correct. 25 26 This the 12th day of October, 2012. 27 28  29 BEVERLY J. GRAMM, RPR 30 Notary Public No. 200811600140 31 My Commission Expires: April 23, 2013 32</p>
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1 STATE OF NORTH CAROLINA  
2 COUNTY OF GUILFORD

3 REPORTER'S CERTIFICATE

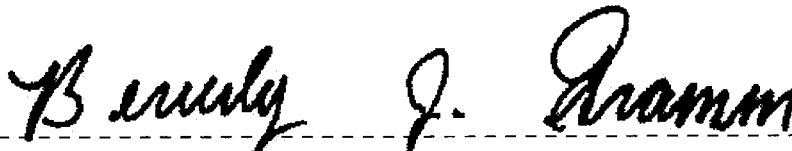
4 I, Beverly J. Gramm, Registered  
5 Professional Reporter, certify that the foregoing  
6 proceedings were taken before me at the time and  
7 place therein set forth;

8 That all objections and statements made at  
9 the time of the proceedings were recorded  
10 stenographically by me and were thereafter  
11 transcribed;

12 That the foregoing is a true and correct  
13 transcript of my shorthand notes taken. I further  
14 certify that I am not a relative or employee of any  
15 attorney or the parties, nor financially interested  
16 in the action.

17 I declare under penalty of perjury under  
18 the laws of North Carolina that the foregoing is  
19 true and correct.

20 This the 12th day of October, 2012.

21   
22

23 BEVERLY J. GRAMM, RPR  
24 Notary Public No. 200811600140  
My Commission Expires: April 23, 2013

25

**ALLERGAN, INC., ET AL. -vs- APOTEX, INC., ET AL.**

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